

INDIANA SECRETARY OF STATE SECURITIES DIVISION

STATEMENT OF POLICY REGARDING INTERPRETIVE OPINION REQUESTS

The Indiana Secretary of State and the Securities Commissioner have determined that it is appropriate and in the public interest to issue a Statement of Policy prescribing the manner and process through which the Securities Commissioner will entertain requests for interpretive opinions, no-action determinations, and exemption rulings.

Statutory Context

Section 23-2-1-15(l) of the Indiana Securities Act ("Act") permits the Commissioner to honor requests from interested persons for interpretive opinions and for determinations that the Commissioner will not institute enforcement proceedings against specified persons for specified activities. Such requests may not be addressed to activity that has occurred before or is occurring on the date that the opinion or determination is requested. Under Ind. Code §23-2-1-2(c), the Commissioner may consider and determine whether a proposed sale, transaction, issue, or security is entitled to an exemption accorded by the Act. For these requests, the interested party must submit a verified statement of all material facts related to the proposed sale, transaction, issue, or security, and a request for ruling as to the particular exemption claimed. For all requests for interpretive opinions, no-action determinations, and exemption rulings the statute prescribes a fee of one hundred dollars (\$100), which must be tendered with the request.

Background

Securities laws are inherently complex, in part because they are designed to cover activities that are ever changing owing to the complex nature of the transactions themselves. Since the law cannot anticipate every transaction or arrangement whereby money is to be used to make more money, traditionally the agency charged with the enforcement of those laws has been authorized to issue regulatory guidance in the form of formal rules, administrative or other types of orders, and policy statements. Even so, the stakes for non-compliance are so high that competent legal counsel often asks regulatory agencies for confirmation of their legal position or opinion. Such confirmation or guidance by the regulatory agency cannot, and is not intended to, take the place of competent legal counsel. Counsel will always be in a better position to sift or establish the factual context giving rise to the issues presented. Nor is this process intended for use by legal counsel who simply expect the agency to do counsel's work. With limited manpower and resources, it is necessary to implement procedures which will enable the Division's staff, time and efforts to be utilized in the most efficient manner and be of assistance to the greatest number of people.

The Securities and Exchange Commission ("SEC") faced a similar problem related to its own policy on no-action requests. In response, the SEC issued interpretive releases that laid out

specific criteria and processes for obtaining a no-action letter. These releases offer clarity for the requesters while also providing a framework for the staff to follow, thereby ensuring that resources are not wasted. In release 33-5127, the SEC provided a list of criteria that the person submitting the request was required to follow to have that request honored.¹ In 1980, the SEC's Division of Corporation Finance adopted the endorsement procedure, which allowed the SEC to answer no-action responses with a mere concurrence with the requester's opinion and without a full recitation of the facts already contained in the request letter.² In release 33-6269, the SEC reiterated the procedure originally provided in release 33-5127 and specifically stated that the same procedure would apply to the endorsement procedure.³ The Division recognizes the merit of the SEC's approach and hereby adopts a similar process and honoring requests for interpretive opinions, no-action letters, and exemption confirmations.

Policy

All requests for an interpretive opinion, no-action determination, or exemption ruling by the Commissioner shall conform with the following guidelines:

- (A) Interpretive opinions under Ind. Code §23-2-1-15(l) are requests for the Commissioner to interpret the law as it applies to a particular situation or transaction, and requests for interpretive opinions must include the following information and be made in the following format:
 - (1) The request letter should state the names and addresses of the issuer and all other persons involved, including all officers, directors and shareholders holding greater than ten percent (10%) of the issuer's securities. Letters relating to unnamed companies or persons will not be answered.
 - (2) Letters must be limited to the particular situation involving the problem at hand and should not attempt to include every possible type of situation that may arise in the future.
 - (3) The request should include a full exposition of all material facts necessary to reach a conclusion, but the exposition should be concise and to the point.
 - (4) The request should include a citation to and discussion of relevant law.
 - (5) The requester must indicate a precise question or questions for the Commissioner to answer, and the requester must submit his or her own professional opinion on the matter as well as the basis for that opinion.
 - (6) Any request for confidential treatment must be made in a separate document and include the basis for that request.

¹ SEC Release No. 33-5127 36 FR 2600.

² SEC Release No. 33-6253 45 FR 72644.

³ SEC Release No. 33-6269 Federal Securities Law Reporter CCH ¶375 at 1257.

(B) No-action determinations are requests for the Commissioner to take no enforcement action if a particular transaction takes place in the manner described in the request. It is not an expression of what the law is. Nor do these determinations bind the Division to an enforcement position for like or other transactions in the future. Requests for no-action determinations under Ind. Code §23-2-1-15(l) must include the following information and be made in the following format:

- (1) The request letter should state the names and addresses of the issuer and all other persons involved. Letters relating to unnamed companies or persons will not be answered.
- (2) Letters must be limited to the particular situation involving the problem at hand and should not attempt to include every possible type of situation that may arise in the future.
- (3) The request should include a full exposition of all material facts necessary to reach a conclusion, but the exposition should be concise and to the point.
- (4) The request should include a citation to and discussion of relevant law and any other arguments, which could constitute a basis for the Commissioner's decision.
- (5) The requester must express his or her view on why no enforcement action should be taken if the transaction were to take place as described as well as why this would be consistent with the policies and goals of the Act.
- (6) Any request for confidential treatment must be made in a separate document and include the basis for that request.

(C) Exemption rulings are more broad since they are binding on the Commissioner and all interested parties to the transaction. A request for an exemption ruling under Ind. Code §23-2-1-2(c) must include the following information and be made in the following format:

- (1) The requester must submit a verified statement of all material facts relating to the proposed sale, transaction, issue, or security. Care should be taken in determining who is in the best position to verify the facts of the offering.
- (2) The request must include the names and addresses of all "interested" parties and explain the relationship or factor which cause such persons to be "interested." In this connection the requester should also indicate those persons who should or should not receive notice of the request and hearing.
- (3) The request must include a citation to and discussion of relevant law.
- (4) The request must include a statement whether or not a hearing is thought to be necessary and the reasons therefor.

- (5) Any request for confidential treatment must be made in a separate document and include the basis for that request.

DATED at Indianapolis, Indiana, this 22nd day of March, 2006.

TODD ROKITA
SECRETARY OF STATE


O. WAYNE DAVIS
SECURITIES COMMISSIONER